OON HOCK LAI & ANOR.

v.

LEE KOK LEONG

HIGH COURT MALAYA, ALOR SETAR
LIM BENG CHOON J
[CIVIL SUIT NO. 217 OF 1981]
9 JANUARY 1990

CONTRACT: *Sale and purchase of land - Building contract - Whether purchaser entitled to specific performance - Whether there was repudiation of agreement - Whether rescission of agreement justified - Questions of fact - Principles to determine repudiation - Section 40 of the Contracts Act.*

CONTRACT: *Building contract and transfer of land - Principles of grant of specific performance ss. 11(2), 20(1), 21(1) of the Specific Relief Act.*

By a written agreement dated 30 September 1979 ("the agreement") the defendant agreed to sell a piece of land and to erect a building thereon for the plaintiffs. The total purchase price for the land and the building was RM63,000 payable in the following manner:

(a) deposit of RM3,000 and

(b) RM20,000 upon completion of certain stages of the building (4 stages in all); and

(c) balance of RM40,000 to be paid from the loan obtained from plaintiffs in the form of progress payments.

The agreement provided that if the plaintiffs failed to make payment, then the defendant would be entitled to terminate the agreement and forfeit the deposit, whereas if the defendant failed to complete the sale, then the plaintiffs would be entitled to specific performance. The defendant had agreed to complete the building within 7 months from the date of approval of the building plans from the relevant authorities. Time was of the essence.

The defendant started construction works in April 1980, and employed an architect to supervise the works which was carried out by a contractor. Construction of the building was to have been completed by November 1980.

Out of the sum of RM20,000 payable under (b) above, the plaintiff did make payment of a sum of RM15,900 although these payments were delayed.

The defendant then ceased work from 11 September 1980 for about 2 months and informed the plaintiffs, upon inquiry, that the reason for the delay was a shortage of funds. The plaintiffs through their solicitors then sent a letter of demand to the defendant warning him of his contractual obligations - there was no response. On 25 February 1981 the plaintiffs wrote to the defendant inquiring as to whether the defendant had completed further stages of the building in order for the plaintiff to make payment of a further sum of RM4,100 (i.e., balance of payments under (b) above). There was no reply. On 7 April 1981 the defendant informed the plaintiffs that his contractor had completed works valued by the architect on 25 March 1981 to be RM25,000 and demanded payment of this sum. The plaintiffs disputed this and an exchange of letters followed. Then on 25 May 1981 the defendant wrote to the plaintiffs informing them that he was rescinding the agreement. The plaintiffs challenged this and the defendant reiterated his alleged right in a further letter dated 1 June 1981 (see text of judgment for contents of the letters).

In the interim, the plaintiffs had tendered payment of the sum of RM4,100, which the defendant rejected. The plaintiffs refused to make payment of the additional RM20,900 on the ground that the construction work on the building had not reached the stage that justified the demand for payment of the same.

The plaintiff applied to the Court for specified performance and a declaration that the defendant's rescission of the agreement was null and void and for a further relief in damages.

Held:

[1] The question in this case was whether or not on or before 25 May 1981 there had been an agreement and was such a repudiation of the agreement on the part of the plaintiffs as entitling the defendant to accept it and say that the agreement was at an end.

[2] The law applicable for the consideration of (1) above is s. 40 of the Contracts Act - This section only means to enact what was the law in England.

[3] Applying *Freeth v. Burr, Mersey Steel and Iron Co. Ltd. v. Naylor, Benzon & Co.* and *Heyman & Anor. v. Darwins Ltd.* the evidence must be scrutinised with a view to finding out the nature and breach of the agreement, the circumstances under which the breach occurred and whether the plaintiffs' acts or conduct evinced an intention not to be bound by the agreement.

[4] The plaintiffs here clearly refused to make payment of the sum of RM20,900 as claimed unless the defendant could justify the same - the defendant on the other hand rely on the architect's certificate to justify this. (see text of judgment for text of certificate).

[5] If the plaintiffs had unlawfully refused to pay the sizeable sum of RM25,000 then the defendant is justified in rescinding the agreement.

[6] The plaintiffs had at no time evinced an intention not to be bound by the agreement - in fact they had all times relied on the agreement to pursue their claims.

[7] The plaintiffs cannot be penalised for not applying to Court for specific performance earlier, after the defendant first stopped work for the same did not distract their eagerness to have the building completed as soon as possible.

[8] The plaintiffs also cannot be penalised for delayed payments as there was no time limit provided for the agreement for these payments - further the delay cannot be said to be so extensive as to warrant the defendant to stop work. The defendant had not made any serious complaints on this, at the material time.

[9] The defendant was not justified in demanding payment of the sum of RM25,000 (which included part of the sum of RM40,000 under (c) above) as the defendant had failed to firstly demand the sum of RM4,100 (being the balance of the sum of RM20,000 under (b) above) and the defendant had also failed to particularise the works that he had done to justify this demand.

[10] The failure of the defendant to complete the construction of the building within time (although of essence) is not significant as the plaintiffs had waived their right to insist on the timely completion of the building.

[11] It would appear from the facts and the wording of the architects certificate that the sum of RM25,000 certified by the architect referred to the total value of the works done so far and not in respect of works done and not paid for.

[12] The jurisdiction to grant specific performance is a discretionary one. Section 21(1) of the Specific Relief Act.

[13] Section 20(1) of the same Act provides that when compensation in money is adequate relief then the contract cannot be specifically performed.

[14] Section 11(2) of the Act presumes that the breach of a contract to transfer immovable property cannot be remedied by compensation unless the contrary is proved.

[15] In addition to the above, the other judicial principles to consider in the granting of specific performance are:

(a) not only must the plaintiff prove that he has at all times been ready and willing to complete the same he must prove that he had performed or had been at all times ready and willing to perform his part of the contract - see *Ganam d/o Rajamany v. Somoo s/o Sinniah;*

(b) generally, a building contract cannot be specifically performed as the same needs constant supervision and usually damages would be an adequate remedy - however and applying *Wolverhampton Corporation v, Emmons* there is an exception to this rule if:

(i) the particulars of the work are ascertained and the Court can sufficiently see what is the nature of the work of which it is asked to order the performance;

(ii) the plaintiff has a substantial interest in having the contract performed which is of such a nature that he cannot be adequately be compensated by damages; and

(iii) the defendant had by the contract obtained possession of the land on which the work is contracted to be done - on this last point Farwell J in *Carpenters Estates Ltd. v. Davies* had decided that the non-fulfilment of this condition is not necessarily a complete bar to the grant of specific performance.

[16] As the agreement in this case also provided for the sale of the land s. 11(2) of the Specific Relief Act would be applicable.

[17] The plaintiffs have proved that they had complied with condition 15(a) above and that their intention was to use the building for their business enterprise - there is therefore no standard for ascertaining the loss by non-performance of the agreement. Further comprehensive plans for the building works have been drawn up and agreed to.

[18] The plaintiff is therefore entitled to specific performance, and a declaration that the defendant's rescission is null and void, damages to be assessed and costs.

[Order accordingly.]

Cases referred to:
Freeth v. Burr [1874] LR 3 CP 208
Mersey Steel and Iron Co. Ltd. v. Naylor Benzon & Co. [1881-1882] 9 QBD 648
Heyman & Anor. v. Darwins Ltd. [1942] 1 All ER 337
Ganam d/o Rajamany v. Somoo s/o Sinniah [1984] 1 CLJ (Rep) 123
Wolverhampton Corporation v. Emmons [1901] 1 KB 515
Carpenters Estates Ltd. v. Davies [1940] 1 Ch 160
Sooltan Chund v. Schiller ILR 4 Cal 252

Legislation referred to:
Contracts Act 1950 (Act 136), s. 40
Contract Act [Ind], s. 39
Specific Relief Act 1950, ss. 11(2), 20(1), 21(1)

For the plaintiffs - Karpal Singh; M/s. Karpal Singh & Co.
For the defendant - Mohd. Kamal bin Mohd Noor; M/s. Jayadeva & Kamal

JUDGMENT

Lim Beng Choon J:

By an agreement dated 30 September 1979 ("the agreement") the plaintiffs agreed to purchase from the defendant a piece of land comprising of 1599 sq. ft. held under Mukim Grant No. MG12 Lot 2570 in the locality of Pekan Tanah Merah, Mukim of Naga, District of Kupang Pasu Kedah. The defendant was and still is the registered owner of the land. It was also agreed that the defendant would erect a double-storey shophouse ("the building") on the land for the plaintiffs. The purchase price of the land together with the building was agreed in the sum of RM63,000.

Under Clause 2 of the agreement, payment of a sum of RM3000 was made by the plaintiffs to the defendant as deposit and part payment of the purchase price upon the execution of the agreement. The stages of progress payments were stipulated under Clause 4 of the agreement. As this clause is the source of the disputes between the parties, it is appropriate to set out in extenso the provisions of this clause:

> 4. The balance of the purchase price of ringgit sixty-thousand (RM60,000) only shall be paid in the following manner:
>
> | | | |
> |---|---|---|
> | (a) Completion of piling work | ... | RM 3,300 |
> | (b) Completion of ground beams | ... | RM 6,300 |
> | (c) Completion of the columns | ... | RM 6,300 |
> | (d) Completion of the floorings of the top floor | ... | RM 4,100 |
> | (e) The balance of RM40,000 to be paid from the loan obtained by the purchaser from the building society or a financial institution in the form of progress payments | ... | RM40,000 |
> | | | RM60,000 |

It was provided in Clause 8 that should the plaintiffs fail to complete the sale of the property according to the terms and conditions contained in the agreement, then the defendant was entitled not only to forfeit the deposit but also to rescind the agreement and to resell the land and the building to the third party. On the other hand should the defendant failed to complete the sale according to the terms and conditions contained in the agreement, the plaintiffs were entitled to specific performance of the agreement pursuant to Clause 9. Clause 10 specified that the building was to be erected within seven months from the date of the approval of the building plan by the local authority. Time was deemed to be the essence of the agreement under Clause 11.

The facts of the case as elicited from the oral as well as the documentary evidence are these. The defendant started constructing the building in April 1980. He employed an architect to supervise the construction works which were carried out by a contractor. It is common ground that the construction of the building should have been completed by November 1980. It is not disputed that the plaintiffs had made three progress payments under items (a), (b) and (c) of Clause 4. There was some delay in making the payments *viz* payment under item (a) was delayed by three days, payment under item (b) by seven days and payment under item (c) by twenty-one days. After the receipt of the third progress payment on 11 September 1980,

the defendant ceased all works for about two months and when the plaintiffs approached him to enquire as to why he had stopped work, he informed the plaintiffs that he had no money to complete the building. In the result the plaintiffs instructed their solicitors to notify the defendant about his alleged inability to carry on with the works due to lack of funds, and to warn him of the consequence of his failure to perform his contractual obligations. The solicitors accordingly wrote a letter dated 12 November 1980 to the defendant and it was sent to him by AR registered mail. The defendant did not respond to the solicitors' letters; neither did he deny what were said in the letter. Notwithstanding the negative response by the defendant the plaintiffs took no further action until 25 February 1981 when he got in touch with the defendant to seek confirmation as to whether he had completed the fourth stage progress payment works as stipulated in item (d) of Clause 4 as the plaintiffs wished to settle the payment under that item. Nothing was heard from the defendant for nearly 1½ months. It was only on 7 April 1981 that the defendant informed the plaintiffs that his contractor had completed works to the building which had been valued by his architect on 25 March 1981 in the sum of RM25,000. He therefore demanded payment from the plaintiffs of that sum. The plaintiffs disputed the claim of the defendant. An exchange of letters between the parties followed and the debate over the claim went on for some time. Apparently the dispute could not be settled and on 25 May 1981, the defendant sent a letter to the plaintiffs informing the latter that he had rescinded the agreement. When the plaintiffs challenged his right to rescind the agreement he sent a second letter dated 1 June 1981 to reiterate his right to do so. As the present case revolves around the right of the defendant to rescind the agreement it is pertinent to set out in *extenso* the contents of the letters of rescission:

First letter dated 25 May 1981

Dear Sir,

Re: Agreement dated 30 September 1979 for purchase of house to be erected on land comprised in MG 12 for Lot 2570 situated in the Mukim of Naga, District of Kubang Pasu, Kedah.

We refer to your letter of 29 April 1981 and have taken our clients instruction to reply thereto.

Our client denies para. 2 of your said letter and states that your client is again delaying payment of the said RM25,000 inspite of the architects certificate confirming the completion of same. As your client is delaying payment of same, our client has been burdened with increased costs of remaining works due to sharp rise in building materials. Our client states that inspite of your client's delay, our client has in good faith continued with the works and completed major works to the tune of RM25,000 and your client is still adamantly refusing to pay same as covenanted by him for the progress works in the above inspite of certified works for same.

Our client denies para. 5 of your said letter and states that he had personally extended a copy of the title to the above including the building plans to enable your client to get the necessary loan for progress payment even though our client was not obliged in the above to do so. Our client states that under the above agreement he never covenanted to facilitate or assist your client in his application for a loan. Under the circumstances surely your client could have applied for a copy of the title at the land office for perusal by his bank.

Our client therefore states that due to your clients delay in payment of the progress works and the consequent rise in building materials, our client has instructed us to notify you that he has rescinded the contract as provided in Clause 8 of the above.

Without Prejudice

Our client in good faith has again requested us to forward to you a copy of the title which we hereby do with a view to speedy settlement of the above for completion of the above. We will therefore appreciate if you could kindly request your client in fairness to pay the extra cost for building materials for completion and obtain a loan for payment of the RM25,000 progress payment due within one month from the date hereof. We will therefore appreciate if you could kindly let us have your client's instructions on same with a view to advising our client on same.

Yours faithfully,
(Signature illegible)

Second letter dated 1 June 1981

Dear Sirs,

Agreement dated 30 September 1979 purchase of house to be erected on land comprised in MG 12 for Lot 2570 situated in the Mukim of Naga, District of Kubang Pasu, Kedah

We acknowledge receipt of your letter dated 27 ultimo. The sum of RM25,000 was due and payable under Clause 4(e) of the agreement of sale dated 30 September 1979 which reads:

(e) the balance of RM40,000 to be paid from the loan obtained by the purchaser from the building society or a financial institutions in the form of **progress payments**.

The certificate of the architect dated 25 March 1981 which was delivered to your clients clearly states that the concrete works of the ground floor, the 1st floor and all columns of the 1st floor have been completed. These works are referred to in the agreement under Clause 4(d) - RM4,100 and part of the works in Clause 4(e) - RM20,900.

Since your clients failed to pay the **2 progress payments** certified by architect your clients have breached the agreement of sale and our clients have rightly rescinded the agreement of sale.

If your client wants to accept our clients offer of settlement they must pay the sum of RM25,000 within 7 days from the date hereof and also agree to pay the increased costs of building materials required for the completion of the shop house. This will be certified by the architect.

Yours faithfully,
(Signature illegible)

In response to the defendant's second letter, the plaintiffs instructed their solicitors to write (which they did) the following letter dated 7 June 1981 to the defendant's solicitors:

Dear Sirs,

Re: Agreement dated 30 September 1979 for purchase of house to be erected on land comprised in MG 12 for Lot 2570 situated in the Mukim of Naga, District of Kubang Pasu, Kedah.

Your letter of the 1st instant has reference.

We enclose herewith our cheque for RM4,100 being the sum payable under Clause 4(d).

Your client's demand for a further sum of RM20,900 is unreasonable as apart from the columns of the 1st floor nothing else has been done and work on the house has stopped these last two months.

We enclose herewith 9 photographs of the said house taken about a week ago for your perusal. Kindly return the photographs to us thereafter.

> Our clients instruct us that they will pay the balance of the purchase price or such part thereof as long as they are satisfied that progress on the house justifies such payment. They are even prepared without prejudice to pay a little extra if your client will guarantee that work will not be delayed.
>
> Your client has no cause to rescind the contract and is in no position to demand that our client pay the increased costs of building materials because he is solely responsible for the delay in the completion of the house. Our client has never failed to pay the progress payment whenever demanded so long as such demand is in compliance with terms of the agreement of sale.
>
> Your faithfully,
> (Signature illegible)

The defendant rejected the plaintiffs' payment and returned the cheque to him.

The question in this case is whether or not on or before 25 May 1981, there had been and was such a repudiation of the agreement on the part of the plaintiffs as entitled the defendant to accept it and say that the agreement was at an end. The law applicable is s. 40 of the Contracts Act 1950 (Act 136) which reads:

> When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

This section of Act 136 corresponds with s. 39 of the Indian Contract Act 1872 and as stated by the Calcutta High Court "this section only means to enact what was the law in England and the law here before the Act was passed *viz.*, that where a party to a contract refuses altogether to perform or is disabled from performing his part of it, the other side has the right to rescind it" (see *Sooltan Chund v. Schiller* ILR 4 Cal. 252). It is useful therefore to study what the English Courts have to say on this aspect of the contract law.

In the leading case of *Freeth v. Burr* [1874] LR 3 CP 208 Lord Coleridge CJ said:

> Where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract.

In *Mersey Steel and Iron Co. Ltd. v. Naylor, Benzon & Co.* [1881-1882] 9 QBD 648 Jessel MR, after approving the principle laid down in the *Freeth v. Burr* went on to say at p. 657:

> ... that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract. That makes it a question of evidence; you must consider the nature of the breach, the circumstances under which the breach occured, and then see whether that is the result of it. There may, indeed, be a case where one party says in so many words that he does not intend to go on with the contract, but generally you must infer the intention from the acts of the parties.

Then in *Heyman & Anor. v. Darwins Ltd.* [1942] All ER 377 Lord Wright said at p. 350:

> There is a form of repudiation, however where the party who repudiates does not deny that a contract was intended between the parties, but claims that it is not binding because of the failure of some condition or the breach of duty should invalidate the contract ... but perhaps the commonest application of the word "repudiation" is to what is often called the anticipatory breach of a contract where the party by words or conduct evinces an intention no longer to be bound, and the other party accepts the repudiation and rescind the contract. In such a case, if the repudiation is wrongful and the rescission is rightful, the contract is ended by the

rescission, but only as far as concerns future performance. It remains alive for the awarding of damages ... for the breach which constitutes the repudiation.

Reverting to the present case, it is, in my opinion, quite clear from the evidence that the plaintiffs here were not prepared to pay the sum of RM25,000 as claimed by the defendant unless the latter could justify his claim under the progress payment scheme specified in Clause 4 of the agreement since they were of the view that the only progress payment due to the defendant up to 25 March 1981 was the payment stipulated in item (d) of Clause 4 amounting to RM4,100. The defendant, on the other hand, relying on what he said was a certification of the value of the works by his architect, persistently claimed that the additional progressive works done by his contractor up to 25 March 1981 were worth RM25,000 and he was entitled to be paid for the works done.

To settle the dispute of the two parties I must scrutinise the evidence with a view of finding over the nature of the breach of the agreement, the circumstances under which the breach occured and then see whether it was the plaintiffs' acts or conduct that evinced an intention not to be bound by the agreement. If it was then the defendant had every right to rescind the agreement since the refusal to pay the sizeable payment in the sum of RM25,000 would justify the defendant to stop work. (see the *Mersey Steel & Iron Ltd.* case).

I shall now turn to a consideration of the plaintiffs and their case. There is no doubt that the plaintiffs were at all times quite anxious to have possession of the building so that they could move to the new premises to operate their business. This is evidenced by the fact that when the defendant stopped work after 11 September 1980 they instructed their solicitors in November 1980 to warn the defendant of the consequence of his default soon after the plaintiffs became aware of the stoppage. The fact that the plaintiffs did not invoke their right to apply to the Court for a decree of specific performance under Clause 9 of the agreement cannot, in my view, distract their eagerness to have the building completed as soon as possible simply because it would complicate matter particularly when the defendant had informed them that he was not able to proceed with the works due to shortage of funds. In any case about three months later the plaintiffs were aware that the defendant did carry out some works and hence wrote to him in February 1981 to inquire whether he had completed the progressive works under item (d) of Clause 4 as they were anxious to settle the fourth progress payment.

The second matter that is worthy of notice is that the plaintiffs had been quite regular in settling the progress payments. They had settled the three progress payments under items (a), (b) and (c) of Clause 4. It is true that there had been some delay in making the payments. But nothing much can be said against them for this delay simply because even though it was stated that time was deemed to be the essence of the agreement nevertheless no time limit was specified in the progress payment clause. Furthermore the delay cannot be said to be so extensive as to warrant the defendant to stop work. In any event the defendant himself had never made any or any serious complaint about the delay at the material time to justify that there had been a disruption of the works.

The third matter that should be noted is the demand of the defendant for the sum of RM25,000 on progress payment of the works. Firstly, I observe that the defendant had not made any demand for the progress payment under item (d) of Clause 4. In his oral evidence he did say that he did make such a demand in February 1981 but I cannot accept his words since every demand for payments of the progress payments under items (a), (b) and (c) of Clause 4 was in writing and no such written demand for the fourth progress payment was produced. It is highly improbable that the defendant would depart from the usual course in

respect of a demand for payment under item (d). Secondly, it is to be noted that it was only after the plaintiffs had by their letter of February 1981 in which they asked for confirmation that works had progressed up to the fourth stage of progress payment that the defendant thought it fit to reply, after 1½ months that his contractor had carried out additional works up to the value of RM25,000. From these two observations, it is inevitable that I must ask myself as to why would the defendant deter from demanding the fourth payment under the said item (d) before making his demand for RM25,000 in March/April 1981 particularly when he was short of money to proceed with the works? The second question that has to be asked is whether the defendant had the right to demand for RM25,000 without prior notice that the works under item (d) had already been completed?

In the search for an answer to both the questions one has to refer to the progress payment stages specified in Clause 4. A careful scrutiny of the scheme of the progress payments under that Clause satisfies me that when the parties entered into the agreement, the parties agreed that the four progress payments under items (a), (b), (c) and (d) being related to the completion of the works stipulated therein were due to be paid only upon the architect's certification that the works stipulated therein had been duly completed and a notice of demand for payment thereof had been given to the plaintiffs. A *fortiori* it is only after the notice of such certification and demand had been made to the plaintiffs before the defendant could demand payment of the subsequent stage of progress payment. I therefore have no doubt that in formulating the scheme of progress payments under Clause 4 the parties had in mind that before the plaintiffs could be called to make payment under item (e) of Clause 4, they must be notified that works under item (d) had been completed and that payment was due under the said item. Such an arrangement was to give a breathing space to the plaintiffs to make arrangements either to get a loan from a financial institution or to set aside a sum of money from their own funds to meet any subsequent payment due under item (e) of Clause 4. That being the case the plaintiffs, to my mind, were entitled to be told that the works had progressed to such a stage that the payments under item (e) would soon be due and that they should get ready the funds (if they had not already done so) to meet any payments to be made under that item. It might be argued that the plaintiffs could have arranged for a loan after settling the first or second or third progressive payments. But that is not what Clause 4 says - the privilege is given to the plaintiffs to arrange for the funds whether at the item (a) stage or item (d) stage. The important point is that they must be given an opportunity to arrange for funds whether by getting a loan from a financial institution or from their own resources to meet the contingencies under item (e) after, and only after, they had been given notice that payment under item (e) would soon be due and the notice must in any event be in the form of a demand for payment under item (d). Bearing in mind that persons involved in business are reluctant to take a loan from a financial institution or to set aside their own funds unless it is necessary to do so, it is idle to say that the plaintiffs should adopt a course that is entirely inconsistent with good business practice. The plaintiffs were therefore right in disputing the claim of the defendant for the payment of RM25,000. Furthermore the defendant had no answer to the contention of the plaintiffs as to why he did not ask for the further progressive payment under item (d) prior to 25 March 1981. At any rate the plaintiffs had at no time evinced any intention not to be bound by the agreement. Indeed they had at all times relied on the agreement to pursue their claim.

I pass now to a consideration of the defendant and his case. He had failed to comply with his obligation to complete the building within the contractual time *viz.*, November 1980. That by itself is not significant since the plaintiffs had waived their right to insist on the timely completion of the building. However when one looks at the reason for his inability to complete

the building within the contractual period his credibility to demand the progress payment of RM25,000 is questionable. It is incredible that he would have not asked for payment under item (d) of Clause 4 had he completed the works specified thereunder particularly when he was in need of funds to complete the building. Furthermore since he had been quite prompt in demanding for the progress payments under items (a), (b) and (c) of the said clause, why would have failed to do likewise in respect of the progress payment under item (d)? No explanation was given and no reason could be distilled from the evidence. The question of his credibility is further compounded by the fact that he did not make his demand for the progress payment of RM25,000 until 1½ months after the plaintiffs had suggested to him that the progress payment under item (d) was due. It may be recalled that in demanding for the RM25,000 payment he refused at first to give a break-down of the works done to warrant his demand. However when the plaintiffs kept on disputing his right to demand for the payment he relented and said that the RM25,000 progress payment comprised of works done by his contractor under item (d) and item (e) of Clause 4. But he had not given any details of the works done under item (e) - he merely said that his architect had given a certification and the plaintiffs must pay. Let us therefore examine the purported certification of his architect. It reads:

> Dear Sirs,
>
> **Re: 2 Double-storey shophouses on Lot No. 2570 & 2571 Mukim Naga, K. Pasu**
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> With reference to the above, we satisfied that the concrete work of the groundfloor, the 1st floor and all the columns of the 1st floor have been completed which is amounted to twenty five thousand dollars (RM25,000).

It can be observed at once that the certification is at its best very indefinite and obscure when one views it in the light of the contents of PW2's report of the stage of work done on the building (see p. 11 of Exhibit "A"). In the report it is stated that the stage of work completed was up to the first floor column without roof beams. It is also stated that completion of flooring of the top floor would mean the laying of floor beams and slab. The report concluded with the statement that the total building works done were approximately 42%. Reverting to the certification one can see that there is no mention that the flooring of the top floor had been completed *viz.*, the laying of the floor beams and slab of that floor. What is more damaging is that there is no mention at all of any works done to justify any payment beyond the progress payment under item (d) of Clause 4. I am convinced, from my analysis of the evidence on this aspect of the case, that the certification is not a certification of only additional works done but a review of the aggregate works done up to 25 March 1981 inclusive of works that had been done earlier for which progress payment had been made under items (b) and (c) of Clause 4. Support for this proposition can be found upon a comparative study of the two earlier certifications of the architect in respect of the progress payments under items (b) and (c) of Clause 4 which read:

> Certification under item (b) "The ground beams of the above shophouses have been completed. The amount of six thousand three hundred dollars (RM6,300) now due for payment.
>
> Certification under item (c) "We are to certify that all columns of the above buildings have been completed. Under the terms of payment according to the agreement (dated 30 September 1979), the amount of six thousand three hundred dollars (RM6,300) is due for payment. (Emphasis is mine)

It can be observed that the two aforementioned certifications give an exact description of the works done under the said items (b) and (c) and that it had been certified that the amounts stated therein were due for payment. But in respect of the purported certification

relied by the defendant for the payment of RM25,000, not only was the description of the works done were vague but there was also no mention that the sum of RM25,000 was due for payment. Any doubt that the purported certification relied by the defendant is not a certification of additional works is dispelled by PW2's report where he said that the complete works on the building was approximately 42%. Bearing in mind that the contractual price of the land and the building was only RM63,000 a simple arithmetical calculation would show that the 42% of the works done could not be worth more than RM26,000. This amount is already more than generous considering that I have not taken into account the value of the land. It therefore follows that it is apparently clear that the certification of the architect relied by the defendant is a certification of the aggregated works done up to March 1981 inclusive of all the previous works of which payments had already been made and which came up to no more than 42% of the total works done. This proposition is further supported by another arithmetical calculation. Bearing in mind that the plaintiffs had paid the three progress payments amounting to about RM16,000 and if they were required to pay another progress payment amounting to RM25,000 that would mean that they would have paid a total sum of RM41,000. Again going back to the contractual purchase price of RM63,000, a payment of RM41,000 would mean that the defendant would have completed at least 65% of the building works. The evidence adduced cannot sustain that the defendant had in fact done works to the extent of 65%. Indeed the defendant himself said that in his evidence that he was entitled to the sum of RM25,000 because he had completed only more than 50% of the works.

In view of my findings as stated above, I am satisfied that the plaintiffs has not committed or threatened to commit a repudiatory breach of the agreement. The most that can be said is that they were merely disputing the right of the plaintiff to ask for a progress payment to which the defendant was not entitled. It was the defendant who repudiated the agreement by refusing to carry on with the works. His purported rescission of the agreement is therefore wrongful in that he was trying to extort money from the plaintiffs for his own benefits. I therefore hold that the defendant is in breach of the agreement by his refusal to perform his obligation which goes to the very root of the agreement *viz.*, to complete the construction of the building.

The final matter to determine is what reliefs should I give to the plaintiffs. They are asking for a decree of specific performance. The jurisdiction to decree specific performance is a discretionary one (see s. 21(1) of the Specific Relief Act 1950) but that section says "the discretion of the Court is not arbitrary but sound and reasonable guided by judicial principles. Furthermore s. 20(1) of the Act says that a contract for the non-performance of which compensation in money is an adequate relief cannot be specifically enforced. The Court is however, directed, under s. 11(2) of the Act to presume that the breach of a contract to transfer immovable property cannot be adequately remedied by compensation in money, unless the contrary is proved. Apart from the statutory limitation in the grant of specific performance, there are also certain judicial principles advocated by the Courts.

The first principle is that it is not sufficient for a plaintiff to prove that he has at all time been ready and willing to complete the sale; he must also prove that he had performed or had been at all times ready and willing to perform his part of the contract - see *Ganam d/o Rajamany v. Somoo s/o Sinniah* [1984] 1 CLJ (Rep) 123. The second principle is that generally a building contract is not required to be specifically performed, the reasons being that a building contract needs constant supervision and usually damages would provide an adequate remedy. In *Wolverhampton Corporation v. Emmons* [1901] 1 KB 515 however Romer LJ has made an exception to this general rule if the following three conditions can be shown to exist in a particular case:

(a) the particulars of the work are ascertained that the Court can sufficiently see what is the exact nature of the work of which it is asked to order the performance;

(b) the plaintiff has a substantial interest in having the contract performed which is of such a nature that he cannot adequately be compensated by damages, and

(c) the defendant has by the contract obtained possession of the land on which the work is contracted to be done.

The third condition laid down in that case has been expanded by Farwell J in *Carpenters Estates Ltd. v. Davies* [1940] 1 Ch 160 where he said:

> I think that this portion of the judgment of Romer LJ is perhaps too widely stated as far as the last requirement is concerned. In my view it is not necessarily a complete bar to the granting of specific performance that the defendant has not obtained by the contract possession of the land on which the work is to be done. In the present case the defendant has contracted to do the work on her own land in consideration of the purchase price of other land belonging to her, and if the other two conditions are fulfilled, I am unable to see why the Court should be debarred from granting relief by way of specific performance.

In the present case the agreement entered into by the parties concerned not only the sale and purchase of the building but also of the land of which the defendant was and still is the registered owner. The purchase price of RM63,000 is for the sale and purchase of both the land and the building. In the circumstances s. 11(2) is applicable. Secondly the plaintiffs have proved not only are they ready and willing to perform their part of the agreement but also that they had at all time performed and had been ready and willing to perform their part of the bargain had the defendant not wrongly rescinded the agreement. There is also sufficient evidence to show that the plaintiffs' intention of buying the building was to use it for their business enterprise. There is therefore no standard for ascertaining the actual loss which they would have suffered by the non-performance of the agreement. Finally the plaintiffs had exhibited comprehensive building plans for the construction of the building (see the annexure to p. 1 of Exhibit "A"). When those plans are looked at it seems to me that the works are sufficiently defined for the purpose of the condition specified in the *Wolverhampton Corporation v. Emmons* (*supra*).

I therefore grant the plaintiffs the following reliefs:

(a) a decree of specific performance of the agreement dated 30 September 1979 executed by the plaintiffs and the defendant in respect of the sale and purchase of the double-storey building erected on the land comprising of 1599 sq. ft. held under Mukim Grant No. MG 12 Lot 2570 Pekan Tanah Merah, Mukim of Naga District of Kubang Pasu, Kedah. The erection of the said shophouse is to commence one month from the date of this order and it is to be completed within seven months thereafter. Excepting what have been mentioned in this judgment the terms and conditions of the said agreement shall continue to apply.

(b) a declaration that the defendant's rescission of the said agreement is null and void.

As regards to damages (if any) suffered by the plaintiffs I will hear the parties on this issue on a date to be fixed by the Assistant Registrar of the Court.

Costs of these proceedings are to be paid by the defendant to the plaintiffs.

Also found at [1990] 1 CLJ 951